COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-9935

BARNSTABLE COUNTY

COMMONWEALTH
Appellee

v.

CHRISTOPHER M. MCCOWEN
Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF
THE BARNSTABLE SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

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April, 2010

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ISSUES PRESENTED

1. Was the defendant denied his right to confrontation when the Commonwealth presented evidence from a substitute medical examiner, and from the DNA analyst who tested the evidence samples and formulated the DNA profiles.

2. Was the defendant prejudiced when the trial judge, after a hearing, discharged a deliberating juror based upon the fact that the juror had lied to the court the previous day about her ability to be fair and impartial.

3. Was the defendant entitled to have his statement to the police suppressed where after an evidentiary hearing

the motions judge found as a matter of fact that the defendant knowingly and voluntarily waived his right to have his statement recorded, and that his statement was voluntary.

4. Was the defendant entitled to a new trial when after a four-day evidentiary hearing the trial judge found as a fact that racial prejudice did not infect the deliberations of the jurors.

5. Was the defendant entitled to a new trial when he did not meet his burden to show that evidence was exculpatory or withheld.

6. Was the defendant entitled to a dismissal of the indictments where he has not shown that there was no probable cause to support the indictments, even if the challenged evidence is not considered.

7. Was the defendant entitled to a change of venue where the defendant did not meet his burden of showing that an impartial jury could not be seated in Barnstable County.

8. Was the judge correct in excluding certain testimony of Dr. Brown that would have allowed the defendant to get into evidence through the backdoor a self-serving hearsay statement.

9. Did the judge err in allowing the Commonwealth to put in evidence of prior bad acts by the defendant during

redirect, when defense counsel had opened the door to this evidence during cross-examinaton.

10. Was there a substantial likelihood of a miscarriage of justice when a defendant is never entitled to a required finding of not guilty based upon a claim that the police did not conduct a thorough investigation.

11. Was the defendant entitled to suppression of his DNA sample given on March 18, 2004, when evidence showed that the defendant willingly gave the sample and was not coerced.

12. Did the judge properly limit the testimony of Richard Ofshe by not allowing him to comment directly upon the credibility of the defendant's statement to the police.

13. Is the defendant entitled to inquire into the retrieval of jailhouse tapes of a third party where the defendant has no standing.

STATEMENT OF THE CASE

1. On June 14, 2005, the defendant Christopher McCowen was indicted on one count of murder (G.L. C 265, §1) (Ind. No. 05-109-01; one count of aggravated rape (G.L. c. 265, §22(a) (Ind. No. 05-109-02); and one count of aggravated or armed burglary (G.L. c. 266, §14) (Ind. No. 05-109-03) (R.

48-50). On June 22, 2005, the defendant was arraigned on all three indictments and pled not guilty (R. 9)[1].

2. On July 13-14, 17-18, 2006, the motion judge held an evidentiary hearing on the defendant's motion to suppress statement, motion Dismiss and/or Suppress the results of his arrest, motion to Dismiss II, and his motion to suppress DNA Results I (R. 17). On September 21, 2006, the motion judge issued his findings of fact and rulings of law denying the defendant's motions (Nickerson, J.) (R. 20, Paper 126) (S.A./ 1-13).

3. Juror empanelment began on October 16, 2006, and was completed on October 18, 2006 (R. 25). Opening arguments were heard and testimony began on that day (R. 25).

4. The jury returned with a verdict on November 16, 2006 (Tr. 33). The defendant was found guilty of (1) murder in the first degree based upon the theories of extreme atrocity or cruelty and felony murder; (2) guilty of aggravated rape; and (3) guilty of aggravated or armed burglary (R. 33).

5. The defendant was sentenced to life without the possibility of parole for the first-degree murder

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[1] The Commonwealth will refer to the record appendix as "R."; the transcript as "Tr."; the supplemental appendix as "S.A."; the evidentiary hearing on the defendant's motion to suppress as "MST"; and the new trial motion evidentiary hearing as "MNT.".

convictions (R. 34). He was given concurrent sentences of natural life on the other two convictions, to run concurrently with the first-degree murder conviction (R. 34). The defendant filed a timely notice of appeal on November 16, 2006 (R. 52).

6. The trial judge conducted an evidentiary hearing over four days On January 10, 2008, January 11, 2008, January 18, 2008, and February 1, 2008 (R. 43-44) on the defendant's motion for a new trial based upon juror misconduct. On April 4, 2008, the trial judge denied the New Trial Motion #1, issuing a memorandum that contained detailed findings of fact and rulings of law (R. 45, paper # 268; R. 211-250). The defendant filed a notice of appeal of the denial of New Trial Motion #1 on April 11, 2008 (R. 45, Paper #269).

STATEMENT OF FACTS

In January, 2002, the victim Christa Worthington had lived in Truro, Massachusetts since 1995 (Tr. 855). She resided at 50 Depot Road in Truro with her two-year old daughter Ava (Tr. 595).

On January 6, 2002, the victim was found dead in her home (Tr. 617). She had a pool of dried blood around her head and an apparent wound to her upper left chest (Tr. 1043). The victim was naked from the waste down and the

clothing covering her top was bunched up (Tr. 1044). Her legs were spread apart; her right knee was up in the air and the foot was flat on the ground (Tr. 618). Seminal fluid and sperm were found in and on her vagina. The defendant's DNA was found on the victim's right breast and in her vagina (Tr. 2440, 2444).

The victim had a 1" x 1½" abrasion to her left forehead (Tr. 1161). She had a irregular 1½" abrasion on her left forehead (Tr. 1173). She had a contusion to her nose and a 3/8" abrasion to her left upper lip (Tr. 1173). She had a 2" abraided contusion to her right eyelid and eyebrow area (Tr. 1174). There was a 1" - 1½" abrasion to her chest and a 3/8" contusion to her left breast (Tr. 1175). In addition, the victim had a 3" circumference hemorrhage inside her head on the right side of her head and scalp (Tr. 1186).

The victim had one 3/4" circumference abrasion and one 1" circumference abrasion to her left forearm (Tr. 1176). There was also a 1/2" abrasion to her outer left knee (Tr. 1178).

The victim had 2¼" contusions to the back of her left hand and the knuckle of her middle finger (Tr. 1195). She had a 3/8" contusion to the knuckle of her third finger on her right hand (Tr. 1195). There was a 1/2" contusion to

the based of her right thumb, a 1/4" contusion at the base of her second finger, and also a 3/4" contusion to the base of the second finger (Tr. 1197).

The victim had a 1"-wide stab wound to her chest (Tr. 1187). The injury was slightly left in her chest (Tr. 1187). The stab wound penetrated through her left lung and exited as a 1/4" cut from her back (Tr. 1187).

Outside of the house the police found a set of parallel marks in the driveway, to the right and rear of the victim's car (Tr. 1058). A set of keys was found in the driveway to the right of the passenger side of the victim's car (Tr. 1068). Eyeglasses were found on the driver's side of the victim's motor vehicle (Tr. 1069). A hairclip/barrette was found on the rear driver's side of the victim's car. Two socks were also found. One was found in the flower bed and the other one of the pair was found on the driver's side of the victim's car (Tr. 1078).

The doorjamb and lock of the victim's door were broken (Tr. 1062). There was a cellular phone on the kitchen table (Tr. 1062). One digit - "9" - was still visible in the phone's display (Tr. 1062).

The defendant Christopher McCowen first came to the police's attention as the police interviewed people who had had contact with the victim (Tr. 1525, 1529). The

defendant worked for a rubbish disposal company and picked up the garbage at the victim's house (Tr. 1530).

State Police Trooper Christopher Mason and Sgt. William Burke first met with the defendant at his place of employment on April 3, 2002 (Tr. 1531). The defendant confirmed that he was the driver of the route that included the victim's house, and his route took him there on Thursdays (Tr. 1533). The defendant said that he picked up trash from outside, and had never had occasion to remove trash from inside the house (Tr. 1534). The defendant said that he had never interacted with the victim beyond an occasional wave (Tr. 1524-1535). The defendant told them that he had no information for them and he only knew about the murder from what he had seen and read in the news (Tr. 1536).

The police asked the defendant if he would be willing to provide fingerprints or a DNA sample for analysis (Tr. 1536). The defendant told the police that he would have no problems providing them to the police (Tr. 1536).

At the time that the police spoke with the defendant in April, 2002, they did not yet have a DNA profile from evidence collected at the scene (Tr. 1540). After the DNA profile was reported by the lab, the police obtained DNA

samples from people and re-interviewed many of the people they had spoken to earlier in the investigation (Tr. 1541).

On March 18, 2004, the police met with the defendant for a follow-up interview (Tr. 1542). The defendant was not a suspect at this time (Tr. 1541). The defendant told the police that the information contained in his earlier April, 2002 report was correct (Tr. 1543).

The police told the defendant that sperm had been recovered from the victim's body and that a DNA profile had been developed (Tr. 1544). The police asked the defendant for a DNA sample, telling him he could refuse (Tr. 1544-1545). The defendant agreed to give them a sample and told the police that he had nothing to do with the victim's murder (Tr. 1549). A buccal swab was taken (Tr. 1547).

On April 7, 2005, the police received verbal confirmation that the defendant's DNA matched that found in and on the victim (Tr. 1553). After receiving written confirmation of this information on April 13, 2005, Mason applied for an arrest warrant for the defendant (Tr. 1554, 1557).

Once at the State Police barracks the defendant was advised of his Miranda rights, which he waived (Tr. 1580-1582). The defendant was then asked for his consent to have the interview electronically recorded (Tr. 1582). The

defendant checked off the box on the waiver form indicating that he did not want to be recorded (Tr. 1583-1584). After declining to be recorded, the defendant asked Mason if refusing to be recorded would make him "look like an asshole" (Tr. 1584).

At the beginning of the interview the defendant said that he remembered twice telling the police that he had never been inside the victim's house (Tr. 1588). The defendant said that the victim had never flirted with him or led him to believe that she was interested in him in any way (Tr. 1590). The defendant described the victim as "not his type" (Tr. 1593). The defendant said that although he had had sexual encounters with women on his route, the victim was not one of those women (Tr. 1591). The defendant told the police, "I can honestly say seriously I didn't know her." (Tr. 1599).

Mason gave the DNA report to the defendant and told the defendant that the lab concluded that it was the defendant's DNA on the victim's body (Tr. 1605). The defendant bowed his head and looked at the report for approximately one minute (Tr. 1605). He then said, "It could have been me." (Tr. 1605).

The defendant then took the police through several versions of what he said happened the night of January 5,

2002 (Tr. 1605-1837). The defendant told the police that he had only ever had sex with the victim that night (Tr. 1643-1644).

The police had never heard Jeremy Frazier's name ever during the investigation until the defendant mentioned him (Tr. 2634). Initially the defendant said that he was not telling the police that Jeremy Frazier had committed the murder (Tr. 1645). The police asked the defendant what the defendant would say if Jeremy Frazier could account for his time (Tr. 1693). The defendant then responded, "Then it's all on me if Jeremy can account for his time." (Tr. 1693). The defendant also told the police, "I never meant for us to go up there and do what I did." (Tr. 1771).

The defendant's ultimate version involved going to the victim's house with Jeremy Frazier (Tr. 1779). Although the victim was startled to see them, the defendant said that he told her that he was tipsy and "just wanted to get some ass real quick" (Tr. 1780). The defendant said that the victim was "cool" with it, and he and the victim had sex inside the residence (Tr. 1780-1781).

The defendant said that Frazier was going through the victim's things while they were having sex, this angered the victim, and she confronted Frazier after she got dressed and followed them out of the house (Tr. 1780-1782).

The victim was yelling at them and the defendant said that they "lost it" and they "put the boots to her" (Tr. 1782). The defendant said that the victim's head hit the gravel so hard that he could still hear it to that day (Tr. 1783).

The defendant said that Frazier grabbed the victim and dragged her into the house (Tr. 1783-1784). The defendant said that the next thing he knew was that Frazier grabbed a knife from a block and stabbed her (Tr. 1784).

The police told the defendant that they had interviewed Frazier, who could account for his time that evening (Tr. 1793). Mason told the defendant that he did not believe that the defendant had given an accurate version of events (Tr. 1836). The defendant responded, "If you did it, you wouldn't tell me." (Tr. 1837).

SUMMARY OF THE ARGUMENTS

1. There was no error in the admission of substitute medical examiner Dr. Henry Neilds' testimony. Doctor Neilds testified in place of Dr. Weiner, who was ill and unable to attend the trial. The defendant was not denied his right to confrontation. (pp 15-20).

The defendant's confrontation rights were not violated by the testimony of the DNA analyst. The analyst who actually tested the evidence samples testified at trial and was subject to cross-examination. The defendant stipulated

to the authenticity of his DNA sample, which was tested by another DNA analyst, who did not testify at trial. (pg 20).

2. The trial judge held a hearing before he discharged a deliberating juror. The evidence supported the judge's finding that the juror had lied to the judge the previous day when she indicated she could still be fair and impartial after her boyfriend was arrested in relation to a shooting investigation. (pp. 20-27).

3. The judge's findings of fact after an evidentiary hearing support his findings that the judge voluntarily waived his Miranda rights and that he knowingly and voluntarily declined to have his statement recorded. The facts of this case do not support the defendant's claim that all statements in the future should be recorded. (pp.27-30)

4. As a result of the defendant's motion for a new trial based upon a claim of racial bias tainting deliberations, the trial judge held a four-day evidentiary hearing. At the conclusion of that hearing the judge found that racial bias did not play a role in the deliberations, and that one of the jurors was not prejudiced against African-Americans. The facts as found at the hearing on the motion for a new trial support the judge's findings of fact. (pp. 30-41).

5. The defendant is not entitled to a new trial because he has not shown that the Commonwealth withheld exculpatory evidence or that the evidence would have materially aided the defendant. (pp. 42-45).

6. The judge did not err in denying either of the defendant's motions to dismiss the indictments. Evidence was sufficient to support all the indictments and there was probable cause to believe that the defendant had committed the crime. (pp. 45-47).

7. The defendant did not meet his burden to show that an impartial jury could not be seated in Barnstable County. The judge conducted a thorough individual voir dire with each prospective juror, ensuring that each was impartial. (pp 47-48).

8. The judge did not err in restricting Dr. Brown's testimony because the defendant sought to elicit a self-serving hearsay statement of the defendant's through Dr. Brown. This statement was not otherwise admissible, unless the defendant took the stand. (pp 49-53)

9. The judge did not err in admitting "prior bad act" evidence that the defendant had restraining orders against him. During his cross-examination, defense counsel opened the door to the admission of this evidence on redirect. (pp. 54-55).

10. The evidence at the motion to suppress supported the judge's conclusion that the defendant was not coerced into giving the police a DNA sample on March 18, 2004. (pp. 55-57).

11. The motion judge did not abuse his discretion when he limited expert Richard Ofshe's testimony to general principles rather than allowing Ofshe to specifically evaluate the defendant's April 14, 2005 statement. (pp. 57-62).

12. The defendant is never entitled to a required finding of not guilty based upon a claim that the police did not conduct an adequate investigation. (pp. 62-63).

13. The defendant has no standing to challenge the method used by the police to retrieve a phone call from Juror Huffman to her boyfriend, who was in jail at the time. (pp.63-65).

ARGUMENT

I. ADMISSION OF THE TESTIMONY OF THE SUBSTITUTE MEDICAL EXAMINER AND THE DNA EXPERT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO CONFRONTATION.

A. There was no error in the admission of the opinions of the substitute medical examiner.

For the first time on appeal the defendant challenges the admission of the testimony of Dr. Henry Neilds (Tr. 1210-1287). The only objection counsel made at trial was

to Neilds reading from his report rather than testifying from memory and then having his memory refreshed as necessary (Tr. 1214). Doctor Neilds' testimony did not violate the defendant's right to confrontation or violate Crawford v Washington, 541 U.S. 36 (2004).

Doctor Neilds testified in place of Dr. James Weiner, who was unavailable because of illness (Tr. 1169, 1213). In his brief the defendant claims that there was nothing in the record to show that Dr. Weiner was unavailable. However there were several references to Dr. Weiner's illness both during direct examination and cross-examination. The defendant did not dispute that Dr. Weiner's illness prevented him from testifying. The defendant here is wrong when he alleges that Dr. Weiner had been fired from his job based upon claims of incompetence. Defense counsel brought out in cross-examination, and accepted as fact, and given the course of Neilds' testimony, obviously knew before trial began that Dr. Weiner was unavailable because of illness (Tr. 1238).

Photographs taken at the autopsy were admitted through the testimony of State Police Trooper Carol Harding, who was present at the autopsy (Tr. 1154). The defendant did not dispute the authenticity of any of these photographs (Tr. 1170-1171, 1200). Doctor Neilds testified that he

formed his opinion from the report, notes, charts, and photographs generated during the victim's autopsy (Tr. 1212).

Doctor Neilds considered a range of materials to reach an independent conclusion as to the cause and time of the victim's death in this matter (Tr. 1212). He testified that he formed his opinion from the report, notes, charts, and photographs generated during the victim's autopsy (Tr. 1212). Pursuant to Commonwealth v Nardi, 452 Mass. 379, 388 (2008) (further citations omitted), Dr. Neilds, as an expert witness, was entitled to base his opinion on: (1) facts personally observed; (2) evidence already in the records or which the parties represent will be admitted during the course of the proceedings; and (3) facts or data not in evidence if the facts and data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion.

A substitute medical examiner testifying as an expert is not limited to giving his own opinion as to cause of death only, but may also give his opinions on a wide range of subjects, based upon his own review of the information gathered at the autopsy. Commonwealth v Avila, 454 Mass. 744, 761 (2009), *citing* Commonwealth v DelValle, 443 Mass. 782, 791-792 (2005). Doctor Neilds applied his own

expertise to reach an independent conclusion regarding the cause and time of the victim's death. That it was essentially the same conclusion as to the cause and time of death as Dr. Weiner is of no consequence. Nardi, supra at 389-390.

Doctor Neilds testified based upon his own experience after an examination of the reports and photographs generated during the autopsy. Defense counsel had an opportunity to cross-examine Dr. Neilds on the foundation of his opinions, therefore the defendant was not deprived of his right of confrontation. Id. at 390.

B. Although it was error for Dr. Neilds to testify to the findings in Dr. Weiner's autopsy report, the error did not create a substantial likelihood of a miscarriage of justice.

While it was error for Dr. Neilds to testify on direct to the hearsay statements contained in Dr. Weiner's autopsy report, no new trial is required. The defendant did not object to Dr. Neilds' testimony referring findings in Dr. Weiner's report during direct examination. Therefore review is limited to determining if this testimony created a substantial likelihood of a miscarriage of justice. Id. at 394 (further citations omitted).

During cross-examination, defense counsel questioned Dr. Neilds extensively on his conclusion as to the time of

the victim's death and how it differed from Dr. Weiner's report as to time of death. Defense counsel referred to Dr. Weiner's autopsy report to try to use the information on the status of rigor mortis, the temperature of the victim's body, and the lack of decomposition and lividity noted to move the time of death out of the Friday night window of time and into a time closer to when the body was found on Sunday (Tr. 1246-1252, 1257; 1264-1266; 1275-1278, 1283).

Defense counsel also used Dr. Weiner's report to point out the lack of injuries to the victim's vaginal area, in order to refute the rape charge (Tr. 1272-1273). "Here the defense...depended on getting at least some of Dr. Weiner's findings before the jury." Id. at 395. Although erroneously admitted during the direct testimony of Dr. Neilds, factual findings from Dr. Weiner's report were used and relied upon by the defendant to show that the victim's time of death could have been much later than the Friday night sexual encounter described in the defendant's statement to the police. The details of the autopsy report were consistent with, and used as part of, the defendant's defense, therefore there was no substantial likelihood of a miscarriage of justice. *See* Commonwealth v Taylor, 455 Mass. 372, 377 (2009) *citing* Nardi, supra at 395-396.

C. There was no error in the admission of the testimony of the DNA analyst who tested all the evidence collected at the scene of the murder.

Analyst Christine Lemire testified that she processed and performed the DNA analysis on the evidence collected at the crime scene in this case (Tr. 2433). Lemire also testified that she then compared these results to the evidentiary standards that had been submitted for comparison (Tr. 2439). The only item that Lemire did not process was the evidentiary standard collected from the defendant (Tr. 2434, 2526). However, defense counsel stated during a sidebar said that he was not attacking the chain of custody or the authenticity of the defendant's swab (Tr. 2522-24). Because the lab analyst who actually tested the evidence at issue testified, there was no violation of the defendant's right to confrontation.

II. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION OR VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL WHEN HE REMOVED A DELIBERATING JUROR AFTER A HEARING.

A. Facts pertinent to this issue

On the third morning of deliberations (the fourth day of deliberations overall) and after a weekend, it came to the Court's attention that jurors had heard information regarding the personal situation of another juror (Tr. 3700-3705).

On the previous Friday evening or early Saturday morning, Kyle Hicks, the boyfriend of Juror Huffman, was arrested during an investigation into a shooting (Tr. 3702). Hicks is the father of Juror Huffman's two-year old child (Tr. 3703).

The arrest took place at Huffman's home in East Falmouth (Tr. 3702). Juror Huffman told the police that she was a juror on this case, and cooperated with them in their investigation that evening (Tr. 3703). She told the police that Hick had used her vehicle that evening, and that she had found him on the living room couch when she got up the morning of the 11th (Tr. 3703).

She gave the police permission to search her vehicle (Tr. 3703). In the trunk of the vehicle the police found 306 unused inspection stickers from an auto dealership in Dartmouth, Massachusetts (Tr. 3703-3704). Juror Huffman told the police that the dealership had left the stickers in the trunk of the car when she bought it, and that the dealership was going to retrieve the stickers at a later date (Tr. 3704). The police had been unable to ascertain the status of the stickers over the weekend (Tr. 3704). Juror Huffman was interviewed by the police, and that interview was audio and videotaped with Juror Huffman's consent (Tr. 3704).

The Court was concerned with the fact that another juror, Juror O'Connell, was aware of Juror's Huffman's situation (Tr. 3704). The judge held a voir dire of this juror, who said that she heard a "blurb" on the television news (Tr. 3706). The juror said she recognized the picture of Hicks, because Huffman had earlier brought in pictures of her son, and Hicks was in the pictures as well (Tr. 3706). From the news, the juror learned that three people were suspects, and one, Hicks, had been apprehended (Tr. 3707).

The juror testified that she spoke with her husband, with Juror Gomes, who knew Juror Huffman, and with the jury foreman Juror Patenaude (Tr. 3707-3708). The juror testified that she spoke with the court officers when she arrived that morning (Tr. 3708).

With both counsel present, the motion judge then held a voir dire of each juror, to determine if they had heard about the incident involving Juror Huffman's boyfriend, and if so, if it affected their respective ability to be a juror in this case (Tr. 3710-3737). During Juror Huffman's voir dire, she testified that she did not harbor any bias or prejudice against the Commonwealth or the individuals who were arrested or involved with the criminal law (Tr. 3740). The judge allowed her to remain on the panel of

deliberating jurors, and admonished her to not discuss this matter involving her boyfriend with anyone else for the remainder of her jury service (Tr. 3741).

The police report of the incident was also marked for identification ("S" for Identification). With counsel present, the judge watched the videotape of Juror Huffman's interview with the police (Tr. 3747; "T" for Identification). For the record, the judge noted that during the interview, Juror Huffman, by voice and gesture, indicated that she was trying to separate from Hicks (Tr. 3752).

The judge ruled that as far as the Court was concerned the matter was closed and Juror Huffman could continue as a juror (Tr. 3748). Later that day the jury reported it was deadlocked (Tr. 3755). At the defendant's request, the judge read the jury the "*Tuey-Rodriguez*" charge (Tr. 3756-3759).

The judge decided in his discretion, and upon the defendant's motion, to sequester the jury (Tr. 3767-3772). The judge also ordered that the defendant and Kyle Hicks not be housed in the same unit or have shared facilities in the Barnstable Correctional Facility (Tr. 3769)

The next morning, November 14, 2006, the Commonwealth presented evidence of tapes of conversations that Juror

Huffman had with Kyle Hicks the previous evening, while Hicks was housed in the Barnstable County Correctional Facility (Tr. 3787). The Commonwealth stated that at the conclusion of playing the tapes it would be moving to remove Juror Huffman pursuant to G.L. c. 234A, §39 (Tr. 3787). The judge noted that the tape had already been played in the judge's lobby, and that all counsel, the judge, and the defendant had heard the tape (Tr. 3787). A disk of the phone calls was marked "V" for identification (Tr. 3789).

After hearing from both the Commonwealth and defense counsel (Tr. 3789-3798), the judge ruled that Juror Huffman would be discharged (Tr. 3802). The judge based his ruling upon the case of Commonwealth v Garrey, 436 Mass. 422 (2002), and his resolution of the facts.

The judge found as a fact that the phone calls showed that Juror Huffman had a closer relationship with Hicks than she testified to the day before (Tr. 3800). The evidence on the tape showed that Juror Huffman had a "very active" relationship with Hicks, and had arranged to help post his bail (Tr. 3800).

The judge also found that during the phone conversations, Juror Huffman discussed how upset she was with the police (Tr. 3800). Juror Huffman "voiced her

displeasure" with the police conduct in Hicks' case (Tr. 3800-3801). Juror Huffman expressed concern about the police checking on her house, her vehicles, and "everything" (Tr. 3801). Juror Huffman expressed concern that the police were lying (Tr. 3801). The judge found that Juror Huffman clearly sided with Hicks, and did not know how they could have arrested him (Tr. 3801).

The Court found that Juror Huffman's statements the previous day that she could be fair and impartial were not true and not reliable (Tr. 3802). The court found that a palpable conflict existed (Tr. 3802).

From the context of the conversation the judge also found that Juror Huffman had directly disobeyed the Court's order as to media coverage, and she was in communication with others about media reports in the defendant's case (Tr. 3801).

B. <u>The judge did not violate the defendant's rights to a fair trial when he discharged Juror Huffman</u>.

Contrary to the defendant's contention, the trial judge did hold a hearing before discharging Juror Huffman (Tr. 3787-3809). The judge did not excuse Juror Huffman because the judge thought she was the juror who had deadlocked the jury (Deft's Brief at 28). There was no evidence at trial as to the reason for the jury deadlock.

The trial judge had discretion in addressing this issue, and a reviewing court must give deference to the judge's conclusions. Commonwealth v Tennison, 440 Mass. 553, 558 (2003) (further citations omitted). In this case, the judge followed, and held a voir dire of the jurors to determine the extent of any extraneous influence. Id. It was clear from the answers of the jurors questioned that the extraneous influence had to do with Juror Huffman and not anything related to the defendant, deliberations, or the case on trial. These questioned jurors did not lie to the judge about their respective ability to remain fair and impartial, nor did they disparage the police in relation to an on-going case involving a close family member. Defense counsel declined an offer from the judge to question the panel further. He did not want the judge to go beyond a general question as whether anyone had seen or heard any extraneous influences (Tr. 3806-3807).

A judge must hold a hearing adequate to determine whether there was good cause to discharge a juror. Commonwealth v Connor, 392 Mass. 838, 843-844 (1984), *citing* Commonwealth v Haywood, 377 Mass. 755, 769-770 (1979). "Good cause" included only reasons personal to a juror, having nothing to do with the issue of the case or

the juror's relationship with her fellow jurors. Connor, supra at 844-845.

The judge removed Juror Huffman because she lied to him the previous day when she minimized her involvement with Hicks and when she said that she could remain fair and impartial. She disparaged the police and showed bias against the police and prosecution in general. A palpable conflict existed because the district attorney's office that was prosecuting the defendant in this case would also be prosecuting Hicks' case. *See* Garrey, supra at 431 n5.

There was no requirement that Juror Huffman be present at this hearing and testify. If she had previously lied under oath, then she would have a legitimate concern not to disclose her perjury before she sought legal advice. Tennison, supra at 559. Juror Huffman's inability to perform the functions of a juror appeared on the record. Connor, supra at 846-847.

III. THE DEFENDANT WAS NOT ENTITLED TO SUPPRESSION OF HIS STATEMENTS MADE TO THE POLICE ON APRIL 14, 2005.

In reviewing a ruling on a motion to suppress, a reviewing court accepts the judge's subsidiary findings of fact absent clear error, but independently reviews the judge's ultimate findings and conclusions of law. Commonwealth v Hensley, 454 Mass. 721, 730 (2009) (further

citations omitted). In his argument, the defendant completely ignores that fact that the trial judge also presided at a three-day evidentiary hearing of the defendant's motion to suppress statements and evidence (R. 17-18, MSTR. 1/16-4/541). The motion judge made written findings of fact and rulings of law denying the defendant's motion.

The defendant only references excerpts from the trial transcript in support of his motion to suppress. In reviewing the judge's ruling on the suppression motion, a court may not rely upon the facts as developed at trial. Commonwealth v Garcia, 34 Mass. App. Ct. 386, 391 (1993), *citing* Commonwealth v Singer, 29 Mass. App. Ct. 708, 709 n.1 (1991).

While there was evidence that the defendant had ingested Perocet earlier in the day, there was no evidence that he was under the influence of this medication at the time of the interview. There was no evidence that the defendant was under the influence of marijuana or had even ingested any of this drug that day, let alone was under the influence of any substance. *See* Commonwealth v Stroyny, 435 Mass. 635, 647 (2002). The police were entitled to rely upon the defendant's outward behavior and assurances of sobriety when deciding whether to proceed with the

interrogation. Commonwealth v Lanoue, 392 Mass. 583, 589 (1984).

The defendant claims that the fact that he declined to be recorded showed how the police's interrogation tactics worked upon him to waive his rights. The defendant's argument is that because the defendant waived his right to be taped, the police must have induced him to waive this right. The facts, as found by the judge, do not support the defendant's claim that he did not voluntarily and intelligently waive his right to be recorded.

The defendant requests that this Court review its ruling in Commonwealth v DiGiambattista, (442 Mass. 423, [2004]), and requests that this Court go further than its previous holding and order that all unrecorded interviews/interrogations be inadmissible at trial. The defendant's argument ignores the fact that the motion judge found as a fact that the defendant knowingly and voluntarily declined to be recorded. The police complied with the requirements of *DiGiambattista* and informed the defendant that they wanted to record his statement, that the courts preferred that statements be recorded, and that the defendant could refuse to be recorded. The defendant cannot now claim that his rights were violated or that his statements to the police were involuntary, in light of the

facts presented at the hearing and the judge's finding that the defendant knowingly and voluntarily declined to be recorded.

IV. THE DEFENDANT HAS NOT MET HIS BURDEN TO SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT ANY IMPROPER INFLUENCES EXISTED DURING THE JURORS' DELIBERATIONS.

After four days of post-trial evidentiary hearings, the judge took the defendant's motion for a new trial under advisement and then issued his findings of fact and rulings of law denying the motion (R. 211-250). In his findings of fact, the judge addressed each claim of racial bias alleged by the defendant.

The judge found as a fact that the issue of race was present from the beginning of the trial. The judge found that in his opening, defense counsel "sounded the theme" that the jurors should consider the possibility that the defendant, an African-American, had a consensual sexual relationship with the white victim, and that someone else killed the victim (R. 214, Tr. 578, 1845, 3530). The judge also found that in presenting this defense, defense counsel on occasion referred to the defendant as a "black man", a

reference appropriate in the context of the defense[2] (R. 214).

A. Standard of Review

The claims raised by the affidavits involve allegations of ethnic bias and a matter of attitude, rather than purported authoritative information unfavorable to the defendant. *See* Commonwealth v Laguer, 410 Mass. 89, 97 (1991) ("*Laguer I*"). Juror bias is not an extraneous matter within the *Fidler* (Commonwealth v Fidler, 377 Mass. 192 [1979]) rule. Laguer, supra at 97, *citing* Commonwealth v Grant, 391 Mass. 645, 653 (1984).

The ultimate concern is determining whether any juror in fact harbored ethnic bias against the defendant. Laguer, supra at 98. The defendant has the burden of showing that the jurors were not impartial and must do so by a preponderance of the evidence. Commonwealth v Amirault, 399 Mass. 617, 626 (1987).

In his ruling denying the defendant's motion for a new trial based upon a claim of juror bias, the trial judge made detailed and meticulous findings of fact and rulings of law (R. 211-250). The defendant urges this Court to

[2] Defense counsel on at least three occasions in his opening and three times in his closing refers to his client's race in referring to a "straw dog" of alleged racism (Tr. 578, 582, 3530, 3546).

make its own findings of fact and evaluation of credibility. However this evaluation was for the trial judge, and respectfully, this court must take the facts and findings of credibility as found by the trial judge, unless they are clearly erroneous. Commonwealth v Laguer, 36 Mass. App. Ct. 310, 314 (1994)("*Laguer II*").

B. Juror Huffman's credibility

In making his rulings, the judge found as a preliminary matter that Juror Huffman was not credible, and he did not credit either her testimony or her affidavit (R. 217-218). The trial judge found that Juror Huffman had been discharged from the deliberating jury after she lied to the police and misled the Court (R. 217, Tr. 3798-3802) (See Commonwealth's Argument II, *ante* at pp.20-27). The judge also found that Huffman disobeyed the Court's instructions to ignore media reports about the case (R. 217, TR. 3801). The judge found that Huffman's discharge from the jury, in light of the arrest of her boyfriend (the father of her child), would have cast her in a bad light within the community and given her motive to "wreak havoc" on the judicial process in this case (R. 217).

The judge did not credit Juror Huffman's affidavit because he found that her version of two critical events were not corroborated by her fellow jurors (R. 217).

First, Juror Huffman claimed that Juror Gomes told her that he did not like blacks (R. 217). This allegation was not borne out by later evidentiary proceedings, which did not corroborate her allegation that Juror Gomes was biased.

Second, the judge found that on at least three occasions Juror Huffman reported supposed racial events to African-American Juror Bohanna, in an attempt to agitate Juror Bohanna and raise her distrust of the other jurors (R. 217-218). Specifically, Juror Huffman reported that Juror George used a charades-type game to mock Juror Bohanna's concern that Juror George racially biased. The judge found that there was no corroboration of this incident by any of the disinterested jurors who witnessed the charades game (R. 217; NMTR. 1/124, 1/138, 2/203, 2/215). The judge found as a matter of fact that Juror Huffman was "meddlesome", had a motive to lie, and her testimony had been refuted by other jurors (R. 218).

C. **"Cahill Incident"**

The judge found as a fact that during deliberations, Juror Cahill at least once told fellow jurors that she feared the defendant because he was staring at her as she sat in the jury box. The judge found that eight of the jurors, when asked during the hearing, denied that Juror Cahill linked her fear to the defendant's race (R. 218;

MNT. 1/102, 1/118, 1/132, 1/145, 2/184, 2/199, 2/213, 2/222). The Court ruled as a matter of fact that while Cahill did express fear of the defendant, race was not a part of that fear (R. 221),

D. "George Incident"

The judge found that during deliberations, Juror George was at an easel explaining her view of the evidence (R. 221). The other jurors challenged Juror George's conclusions and reasoning and the discussion was heated (R. 221, MNTR. 1/10). The judge found that while Juror George's exact words could not be ascertained, the jurors reported that Juror George said something to the effect that when a big black man (or a 200 pound black man) beats on a small woman, serious bruising will occur (R. 221; MNT. 1/10).

Juror Bohanna immediately rose to challenge Juror George, asking her what being black had to do with it, and calling Juror George a racist (R. 222; MNT. 1/10, 1/117, 2/210). The judge found that Juror George denied being a racist, and stated that her words were an accurate description of the facts (R. 222; MNT. 1/136-137).

When called a racist, Juror George vehemently denied it and she and Juror Bohanna swore at each other (R. 222; MNTR. 1/52). Juror George told Juror Bohanna, "That's not

what I was meaning and you know that." (R. 224; MNT. 2/194).

The judge found as a matter of fact that the respective affidavits of Juror Bohanna and Juror Huffman overstated the confrontation when they alleged that Jurors George and Bohanna had to be separated during their argument (R. 222, n.14). The judge noted that Juror Huffman testified that Juror George said "this big black guy", and then caught herself and shifted to "a big black man" (R. 223; MNT. 69).

The confrontation ended when Juror George said she meant no harm and the jury foreman called for a break (R. 222, 225). During the break Juror George and Juror Bohanna engaged in civil conversation (R. 222, 225; MNT. 17).

The judge found as a matter of fact that Juror George denied any racist intent in her statement (R. 222, n.14). The judge found as a matter of fact that whether the words "big black man" or "this big black man" were used, the reference was specifically to the defendant (R. 225).

In the context of the evidence at trial, the racial reference was part of the deliberative process and did not even come close to the racial invective found in Laguer, supra; *see also* Commonwealth v. Tavares, 385 Mass. 140 (1982).

E. Allegation of bias on the part of Juror Gomes.

The due process requirement is satisfied by a hearing conducted by the trial judge where the defendant has the opportunity to show that a juror was actually biased because the juror dishonestly answered a material question on voir dire, and that prejudice resulted from that dishonesty. Amirault, supra at 625, *citing* McDonough Power Equip., Inc. v Greenwood, 464 U.S. 548 (1984), and Smith v Phillips, 455 U.S. 209 (1982). The defendant must first show that Juror Gomes failed to honestly answer a material question on voir dire; and then secondly must show that a correct response would have provided a valid basis for a challenge for cause. Amirault, supra at 625, *quoting* McDonough, supra at 556. The defendant had the burden of showing that Juror Gomes was not impartial by a preponderance of the evidence. Armirault, supra at 626.

1. Questioning of Juror Gomes

The focus of the hearing was not whether Juror Gomes, a man of color, had in fact made racially-biased statements in the past, but whether Juror Gomes was in fact biased against the defendant. Id. at 627-628. Juror Gomes' testimony is not inherently suspect and may be relied upon in determining the existence of bias. Id. at 626.

The trial judge based many of his rulings pertaining to Juror Gomes upon his observation of Juror Gomes in the courtroom during the trial. The trial judge rejected Miranda's claim that Juror Gomes was racist based in part upon these observations (R. 229). The trial judge observed that during empanelment he found Juror Gomes to be "as straightforward as any" (R. 229; Tr. 336). The trial judge found that Juror Gomes was "riveted" to testimony at all times and he listened carefully regardless of which attorney was speaking (R. 229). The judge found as a matter of fact that these observations of Juror Gomes did not suggest a closed mind (Tr. 229-230).

The Supreme Judicial Court has found that only in extreme circumstances does "implied bias" exist. Amirault, supra at 628. Examples of "extreme situations" that would justify a finding of implied bias include: (1) the juror is an actual employee of the prosecuting agency; (2) the juror is a close relative of one of the participants in the trial or criminal transaction; or (3) the juror was a witness or somehow involved in the criminal transaction. Amirault, supra at 628 n5, *quoting* Phillips, supra at 222 (O'Connor, J., concurring).

The analogous federal counterpart of "implied bias" is the "disqualifying state of mind". *See* Aldridge v United

States, 283 U.S. 308, 313 (1931) (discussing the right to examine jurors at pre-trial voir dire to determine the existence of a disqualifying state of mind, involving race, religion, or other prejudice).

Another factor weighed against finding of implied bias. Juror Gomes had been accused of a crime himself years before, and had ultimately been found not guilty. Gomes had been the recipient of the properly-functioning court process. Certainly this Court can take into consideration Gomes' sensitivity to the court process, and of convicting someone on anything less than the evidence presented at trial proved beyond a reasonable doubt.

As required by the circumstances of this case, this Court conducted an individual voir dire of the prospective jurors. Juror Gomes was screened through this process. The judge found that Juror Gomes was a member of the Cape Verdean community, and by appearance was a minority community (R. 226)

Juror Gomes stated that he had been exposed to pre-trial publicity "a while back", but that he had "not really" formed an opinion about the case (Tr. 329). He stated that this information would not affect his ability to be fair and impartial (Tr. 329). Juror Gomes stated that he believed that he could set aside this information

and judge the case solely on the evidence presented in the courtroom (Tr. 330).

During empanelment the Court ruled as a matter of fact that Juror Gomes' demeanor displayed nothing other than forthrightness (Tr. 336). The Court found Gomes to be "as straightforward as any" (Tr. 336). The trial jduge stated that it was basing this decision "on the character of the man as I discern it from his demeanor and his answers." (Tr. 336).

During the smoking break after the "Cahill incident", Juror Huffman alleged that Juror Gomes told her that his brothers' wives were white, that he had always been around white people, and that he did not like blacks because look what they are capable of (R. 226; MNT. 73-74). The latter comment was in response to Juror Bohanna's confrontation of Juror Cahill (Tr. 226; MNT. 73). The judge found as a fact that Juror Gomes did not make this statement to Juror Cahill, because Juror Gomes only had one brother (R. 226, n.19; MNT. 121).

Juror Gomes testified that the jurors spoke about the need to be sure that the verdict was not tainted by racial bias (MNT 1/122). Gomes agreed with this statement and said so during deliberations (MNT. 1/123). This reminder was mentioned a few times (MNT. 1/123). Several jurors

(Gomes said he was one of them) said that they wanted to make sure that the verdict was not tainted by racial bias (MNT. 1/123).

2. Finding of lack of credibility of Delainda Miranda

The judge found as a fact that Delainda Miranda did not appear in court until after the second day of juror testimony on January 11, 2008 (R. 227). Miranda was the 74 year old great-aunt of Gomes (R. 227; MNTR. 4/6).

In addition, two of three of Miranda's sons had been convicted of various offenses leading to jail and state prison sentences by this prosecuting district attorney's office (R. 229; MNTR. 4/6). The Court found that Miranda harbored some resentment toward law enforcement (R. 229).

The judge found that Miranda's presence as a witness came about through writer Peter Manso, who had recently declared his advocacy for the defendant (R. 227). The judge found that Miranda lacked credibility because she reached out to Manso rather than defense counsel (R. 228). The trial judge himself noticed Miranda's interaction with Manso at the end of the third day of jury hearings (MNT. 4/48) and he questioned her closely (MNT. 4/38-49). Miranda hesitated answering, or was inconsistent in her answers, to questions designed to elicit her familiarity with certain people (MNT. 4/38-49).

Miranda did not come forward until this late time in spite of the fact that she testified that she had read everything about the case in the newspapers over many months (MNT. 44). The judge found that at the hearing Miranda could not recall events without having her affidavit in hand (R. 228).

F. Credibility of Juror Audet

Juror Audet was one of the three jurors who gave an affidavit to defense counsel after speaking with defense counsel post-trial (R. 214). The Court found that Audet's demeanor and hesitancy on the witness stand conveyed to the judge that Audet was trying to recall events (R. 231). The Court found that although Audet was sincere in his testimony, the passage of time had enhanced Juror Audet's memory of the aspects of the deliberations dealing with race (R. 231).

G. Conclusion

The trial judge's extensive findings of fact and rulings of law show that there was no juror bias, and that race did not play any part in the minds of these jurors. The defendant has not met his burden of showing that he was denied a fair trial.

V. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL BECAUSE THE PROSECUTOR DID NOT WITHHOLD EXCULPATORY

EVIDENCE RELATING TO AN ALLEGED "PRIOR BAD ACT" BY WITNESS JEREMY FRAZIER.

A. The evidence was not exculpatory.

The incident leading to Frazier's arrest in Wellfleet does not negate the defendant's guilt in this case or support his innocence. The presence of a knife is the only commonality between the two crimes. Use of a knife, standing alone, is insufficient to cast any doubt upon the identity of the victim's killer or the defendant's conviction.

Due process requires that the government disclose to a criminal defendant favorable evidence in its possession that could materially aid the defendant's defense against the pending charges. Commonwealth v Laguer, 448 Mass. 585, 593 (2007) (further citations omitted). Exculpatory evidence comprehends all evidence which tends to negate the guilt of the accused or support the accused's innocence. Laguer, supra at 595 (further citations omitted).

Such evidence of alleged prior bad acts, even assuming its admissibility, might have been important to the defendant's defense to try to focus attention on someone else for his crime. However, the fact that it may have been useful to the defendant's defense and trial tactics does not make it exculpatory. It was up to the defendant

to investigate and develop his own evidence in attempting to present a defense to the jury.

B. **The evidence of alleged prior bad acts was not in the custody or control of the Commonwealth or the police who participated in the investigation and presentation of the case.**

The Commonwealth is only required to turn over exculpatory evidence in its possession. Commonwealth v Daughtry, 417 Mass. 136, 143 (1994). This duty to turn over evidence extends to evidence in his or her possession as well as that in the possession of the police who participated in the investigation and presentation of the case. Laguer, supra at 591 n.21; *see also* Daughtry, supra at 143; *and* Commonwealth v Daye, 411 Mass. 719, 734 (1992).

Police reports from a dismissed Wellfleet case were not in the possession of either the District Attorney's Office or the police who participated in the investigation of the defendant's crime. The defendant includes all police reports from any police department as part of the definition of "Commonwealth". Such a broad reading is unworkable and overbroad as a matter of law.

C. **The defendant is not entitled to a new trial because the prosecutor did not withhold exculpatory evidence relating to problems at the State Police Crime Laboratory.**

The defendant has not met his burden to prove that the Commonwealth withheld exculpatory evidence relating to management problems at the Massachusetts State Police Crime Laboratory. Publicity about the administrative problems at the crime lab was pervasive in both the general state-wide media and in the state legal media.

The Final Report and Recommendations regarding Vance's Comprehensive Operational Assessment of the Massachusetts State Police System ("Vance Report") was not released until June 29, 2007, more than seven months after the trial. In the first paragraph of the executive summary on page 4 of the Vance Report, the commission appointed to examine the crime lab found specifically that the scientific methodologies were sound, but that changes needed to be made in management (R. 474)

The defendant's own forensics expert, Dr. Richard Saferstein, testified that he was familiar with the Massachusetts State Crime Laboratory (Tr. 3079). Saferstein testified that he "[had] no problems with the work they performed." (Tr. 3079). Saferstein particularly testified that he had no problem in agreeing with the data that was generated by the analysts at the Crime Lab (Tr. 3081).

VI. THE JUDGE DID NOT ERR IN DENYING THE DEFENDNT'S

TWO MOTIONS TO DISMISS THE INDICTMENTS.

A. Pre-trial motion

The defendant was not entitled to a dismissal based upon the fact that the grand juror knew the victim, her daughter, and Tony Jackett. The trial judge issued a memorandum of law denying the defendant's motion (S.A./14-17).

The fact that the grand jurors may have some familiarity with an alleged crime, bring this information into the grand jury room, and act on it, is not sufficient to require either further inquiry into alleged prejudice or an automatic dismissal of an indictment. Commonwealth v McLeod, 394 Mass. 727, 734 (1985). There is no requirement that a grand juror be completely ignorant of the facts before her. Even the *Woodward* case (Commonwealth v Woodward, 157 Mass. 516 [1893]), cited by the defendant, stands for the proposition that simply because a single grand juror had secured information incompatible with impartiality does not invalidate the action of the grand jury. *See* Commonwealth v McNary, 246 Mass. 46, 54 (1923).

B. Post-trial motion

Contrary to the defendant's contention, the trial judge did resolve the defendant's second motion to dismiss

indictments by denying it (Tr. 3675-3677, Tr. 11/10/06, 5-7[3]).

The judge was correct in ruling that Mulvey's testimony would have been tangential to the indictment. The judge found that there was "abundant" evidence before the grand jury that would permit indictment for murder under either principal or joint venture liability (Tr. 11/10/06, 6-7).

Dismissal of an indictment based on impairment of the grand jury proceedings requires proof that: (1) the Commonwealth knowingly and recklessly presented false or deceptive evidence to the grand jury; (2) the evidence was presented for the purpose of obtaining an indictment; and (3) the evidence probably influenced the grand jury's decision to indict. Commonwealth v Silva, 455 Mass. 503, 509 (2009) (further citations omitted).

In addition, at the time the defendant made his motion to dismiss, Frazier's testimony was not shown to be false. Instead, the evidence that the defendant claimed should have been put before the grand jury was repudiated as false by Mulvey when he was on the stand and under oath (Tr.

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[3] A court reporter other than the reporter who covered the rest of the trial was present on this day, therefore the pagination is out of sync with the other volumes in the trial.

2232-2237). At trial, Mulvey testified that he was "100%" sure that Frazier spent the night of January 4, 2002 at his house (Tr. 2231).

VII. THE MOTION JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED THE DEFENDANT'S MOTION FOR A CHANGE OF VENUE AND THE DEFENDANT'S INITIAL MOTION FOR SEQUESTRATION OF THE JURY.

The decision whether to grant a change of venue rests in the sound and substantial discretion of the trial judge. Commonwealth v James, 424 Mass. 770, 775 (1997). The burden is upon the defendant, as the moving party, to show prejudice necessitating the relief sought. Commonwealth v Burden, 15 Mass. App. Ct. 666, 672 (1983). He has not met his burden of showing that the jurors were affected by an extraneous influence. See Commonwealth v Clark, 432 Mass. 1, 18 (2000).

The judge held off ruling on the motion for a change of venue, preferring to begin empanelment. At that time he held a hearing on the defendant's motion for a change of venue (Tr. 10-27). The judge noted that some of the media attention and pre-trial publicity had been generated when defense counsel talked to the media (Tr. 23-24). The judge denied the defendant's motion without prejudice, to be reconsidered if they had problems seating a jury (Tr. 26).

At the time of empanelment, the judge posed questions of bias, prejudice, and knowledge of the case to all the potential jurors (Tr. 67-232, 266-464, 477-512). The defendant did not renew his motion for a change of venue at the time the jury was seated (Tr. 512, 542).

The judge is entitled to accept, without more, the declaration of the jurors as to their disinterest and freedom from emotional or intellectual commitment. Commonwealth v Barnes, 40 Mass. App. Ct. 666, 670 (1996). Unless the trial judge first determines that there is a substantial risk that juror impartiality may be affected by extraneous influences, there is no requirement for a full, individual examination. Commonwealth v Duddie Ford, 28 Mass. App. Ct. 426, 431 (1990).

Pre-trial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically to an unfair trial in a criminal case. Burden, supra at 672, *quoting* Nebraska Press Association v Stuart, 427 U.S. 539, 565 (1976). Nor is it required that potential jurors be totally ignorant of the facts and issues involved.

In this case, the trial judge engaged each prospective juror in a voir dire to determine bias, exposure to pre-trial publicity, and whether the prospective juror had formed an opinion about the case. The judge was entitled

to accept, without more, the declaration of the jurors as to their disinterest and freedom from emotional or intellectual commitment. Barnes, supra at 670. The defendant has not met his burden of showing that pre-trial publicity prevented him from getting unbiased jurors and having a fair trial.

VIII. THE JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE RULED THAT THE COMMONWEALTH HAD NOT OPENED THE DOOR TO ALLOW THE DEFENDANT TO GET INTO EVIDENCE SELF-SERVING HEARSAY TESTIMONY DURING REDIRECT.

The defendant alleges that the judge erred in ruling that the Commonwealth had not "opened the door" when it questioned the defendant's expert witness Dr. Eric Brown about the creation of a map of the victim's residence during his interrogation April 14, 2005. The judge did not abuse his discretion because the Commonwealth did not open the door to the admission of the defendant's hearsay statements during its cross-examination of Dr. Brown.

The defendant presented Dr. Brown to testify to the intelligence tests that he gave the defendant. Before Dr. Brown testified, the Commonwealth moved *in limine* to exclude Dr. Brown from testifying to any statements by the defendant to the fact that he claimed to have had a consensual sexual encounter with the victim on Thursday, January 2, 2002 (Tr. 3154-3167). While arguing in favor of

this statement's admissibility, defense counsel conceded that using Dr. Brown could be seen as a backdoor attempt to get this alleged sexual encounter before the jury without the defendant having to take the stand and be subject to cross-examination (Tr. 3159). The defendant however maintained that the statement was otherwise admissible to show the defendant's state of mind as it related to the voluntariness of his statement to the police on April 14, 2005 (Tr. 3157).

The statement by the defendant to Dr. Brown was an inadmissible self-serving hearsay statement because in actuality it was offered to prove the truth of the statement's content - that the defendant had a consensual sexual encounter with the victim on Thursday, January 2, 2002. Commonwealth v Eugene, 438 Mass. 343, 350 (2003) (further citations omitted).

Dr. Brown testified to the battery of intelligence tests he gave to the defendant (Tr. 3179). As a result of this testing and a review of the results, Dr. Brown opined that a person with the defendant's IQ would have been severely compromised in his/her ability to participate in an interrogation in a meaningful and optimal way (Tr. 3192).

During cross-examination, the prosecutor questioned Dr. Brown about the defendant's drawing of two diagrams during the interrogation on April 14, 2005 (Tr. 3286-87). This line of questioning arose during the prosecutor's questioning of Dr. Brown, challenging Dr. Brown's opinion that the defendant's IQ would have impaired his memory and he would not consciously have lied to the police about his denial of contact with the victim before he was shown the DNA report (Tr. 3281-3286).

Claiming that the door had been opened through this testimony, the defendant sought to elicit from Dr. Brown the defendant's self-serving hearsay statement that the defendant had been present in the victim's home on Thursday, January 2, 2002 and had consensual sexual relations with her at that time. Defense counsel claimed that this statement provided an alternate reason for the defendant's knowledge of the interior of the victim's home (Tr. 3291-94). However, the defendant obviously wanted to use this hearsay statement to explain the presence of his DNA on and in the victim, and to distance himself from his statement to the police that he had consensual sexual relations with the victim during the same encounter that ended with the victim's stabbing and murder.

The trial court reviewed the trial testimony of Dr. Brown and the context of the Commonwealth's cross-examination. The judge ruled that the focus of the Commonwealth's cross-examination was to review evidence of the defendant's alleged intoxication during the interview, the defendant's ability to recall information, and whether he had the capacity to lie (Tr. 3293, 3300). The trial judge held a voir dire of Dr. Brown in order to allow the defendant to put his offer of proof on the record (Tr. 3295-3306).

The judge ruled that the focus of the cross-examination was not tied to the reason why the defendant had been present in the victim's home (Tr. 3293). The judge also ruled that it was apparent that trial counsel was not seeking to admit the statement to refute claims that the defendant was lying during his interrogation with the police (Tr. 3306). The judge ruled that the defendant was attempting to get this information in through the backdoor (Tr. 3306).

In order to "open the door" to the admission of evidence, a party must present some evidence that suggests the focus of evidence or line of questioning that relates to or implicates the excluded evidence. *See* Commonwealth v Williams, 450 Mass. 879, 887 (2008). Because in this case

the context of the challenged line of questioning focused on the *defendant's impairment and ability to remember*, not upon why he knew the layout of the victim's home, the Commonwealth did not open the door. The defendant's reason for the knowledge of the layout of the victim's home was irrelevant to the Commonwealth's line of questioning challenging Dr. Brown's opinions that the defendant was intellectually impaired. *See* Commonwealth v Carroll, 439 Mass. 547, 556-557 (2003).

The judge noted that there was obviously a way to get this statement in, but that the defendant was choosing not to testify, as was his right (Tr. 3306). The defendant could not use Dr. Brown as a proxy to elicit the defendant's self-serving hearsay statements, thereby allowing the defendant to avoid taking the stand and being subject to cross-examination.

IX. THERE WAS NO ERROR IN THE ADMISSION OF "PRIOR BAD ACTS" TESTIMONY DURING REDIRECT WHEN THE DEFENDANT OPENED THE DOOR TO THIS ISSUE DURING CROSS-EXAMINATION.

During his cross-examination of Mason, defense counsel left the jury with the impression that Mason applied for an arrest warrant based solely upon the fact that the defendant had previously lied when he said that he had never had physical contact with the victim (Tr. 1908-1909).

At sidebar, the Commonwealth sought to admit certain "prior bad act" evidence to counteract this impression (Tr. 2018). Mason also took into consideration evidence of the defendant's prior history violence against women (Tr. 2020). The judge allowed the Commonwealth to present this evidence over the defendant's objection, and indicated that he would immediately give a limiting instruction on the use of this evidence (Tr. 2026).

The Commonwealth cannot introduce evidence that a defendant previously misbehaved, indictably or not, for the purposes of showing his bad character or his propensity to commit the crime charged, but such evidence may be admissible if relevant for some other purpose. Commonwealth v Helfant, 398 Mass. 214, 224 (1986), citing Commonwealth v Drew, 397 Mass. 65, 79 (1986).

During redirect, the Commonwealth elicited from Mason that in addition to the knowledge that the defendant lied about a lack of physical contact with the victim, Mason was also aware that the defendant had five different restraining orders with five different women (Tr. 2082-2083). Mason testified that he also knew that the defendant had a number of charges at the Barnstable District Court (Tr. 2083).

Following this testimony, the trial judge immediate gave the jury a limiting instruction on the use of this evidence (Tr. 2083-2084). The evidence was admissible to rebut the false impression of the sufficiency of evidence used by Mason to apply for and receive an arrest warrant.

X. THE INTERESTS OF JUSTICE DO NOT REQUIRE A NEW TRIAL PURSUANT TO G.L. c. 278, §33E.

The defendant does not argue that the interests of justice require a lesser degree of guilt. Nor does he ask this Court to reduce his conviction pursuant to G.L. c. 278, §33E.

A. After an evidentiary hearing, the evidence supported the judge's finding that the defendant knowingly and voluntarily gave the police a buccal swab on March 18, 2005, for the purposes of DNA analysis.

There is no factual support for the defendant's contention that he was coerced into giving the police a buccal swab. The defendant's motion to suppress evidence was heard at the same time as his motion to suppress statements. His probation officer Joseph Casey testified at the hearing.

The judge found as a fact that the defendant was called into the probation office on March 18, 2005, because he missed an appointment the previous day and it needed to be rescheduled. Mason and Burke had been in contact with

Casey because they knew that Casey was the defendant's probation officer and they were attempting to contact the defendant for another interview. At that time the State Police were re-interviewing men who had been in contact with the victim at the time of her death. Mason and Burke did not tell Casey why they wanted to meet with the defendant, but they did tell him that the defendant had been cooperative.

Mason and Burke arrived at the probation office within 15 minutes before the defendant's scheduled appointment with Casey. When the defendant arrived, Casey led him to the room where Mason and Burke were waiting. Casey told the defendant to see him after he finished his business with the police, in order to reschedule his appointment.

Mason and Burke met with the defendant for approximately 20 minutes. At the beginning of the interview they told the defendant that they wanted to re-interview him. The defendant agreed to speak with them. The defendant repeated his statement that he had had no direct contact with the victim. During the interview the police told the defendant that DNA evidence derived from seminal fluid had been recovered from the victim and they asked the defendant if he would provide a sample of his DNA.

The defendant consented and his DNA sample was taken by way of a buccal swab. The judge found that there was no evidence presented at the hearing to suggest that the defendant involuntarily complied with this request. The judge found as a fact that the defendant did not fear that any consequences would arise if he refused to provide a DNA sample. When the interview ended the police told Casey that the defendant had been cooperative. Burke told Casey that it was the defendant's decision whether he would tell Casey what the meeting was about. The police then left and Casey met with the defendant and rescheduled his appointment. The defendant volunteered to Casey that the police spoke with him about the victim's murder because he was her trash man.

B. The judge did not abuse his discretion when he excluded proposed testimony from the defendant's expert, Richard Ofshe.

The defendant claims that he was denied the reasonable cross-examination of Richard Ofshe, and expert called by the defendant to testify to the phenomenon of false confessions. The judge did not abuse his discretion in limiting the witness's testimony.

The admission of expert testimony lies largely in the discretion of the trial judge. Commonwealth v Richardson,

423 Mass. 180, 182 (1996). The judge's ruling will be reversed on appeal only if it constituted an abuse of discretion or was otherwise tainted with error of law. Commonwealth v Tolan, 453 Mass. 634, 647 (2009); Richardson, supra at 182 (further citations omitted).

The voluntariness of a confession is an area within a jury's common knowledge and understanding. Interrogation techniques can be understood by jurors without expert assistance. Tolan, supra at 648, *quoting* Commonwealth v DiGiambattista, 442 Mass. 423, 437-438 (2004). Expert testimony is only needed if the subject of expert testimony is beyond the common knowledge or understanding of a lay juror. Commonwealth v Sands, 424 Mass. 184, 186 (1997).

Before Ofshe's testimony began, defense counsel at sidebar told the judge and the prosecutor that he was not intending to get "case specific" and would keep it tight (Tr. 3343, 3497). The judge remarked the best model would be for Ofshe to discuss factors that indicated a false confession in general (Tr. 3398).

Defense counsel, during his direct examination, then asked Ofshe that if as a result of reviewing documents in this case Ofshe had an opinion as to whether the indicia false confessions existed in the defendant's case (Tr. 3424-3425). The prosecutor objected (Tr. 3425). At

sidebar the judge noted that Ofshe himself was not making an opinion as to the facts in this case, and that he did not hold an opinion as to whether this case evinced a false confession (Tr. 3362, 3426).

Without the jury present, initially the judge also expressed reservations with the "science" of false confessions, (Tr. 3429-3342) and held a voir dire of Ofshe to determine the basis of Ofshe's opinions (3425-3437). At the conclusion of the voir dire and after hearing argument from both counsel, the trial judge limited Ofshe's testimony only to relating the factors in general that were potentially indicative of a false confession. The judge based his ruling on three difficulties he found with Ofshe's testimony: (1) it could be said that Ofshe's testimony invaded the province of the jury; (2) Ofshe's view of the issue was through a more narrow lens than the jury would be instructed as a matter of law; and (3) the best that Ofshe can say is that the indicia are present, but he cannot testify that the indicia were driving the interrogation in this case, let alone whether they decided the outcome of the interrogation (Tr. 3340-3341).

Ofshe would not have been able to express an opinion in terms of probabilities rather than possibilities. *See* Goffredo v Mercedes-Benz Truck Company, 402 Mass. 97, 102

(1988). The judge noted that Ofshe's expert opinion would intrude upon an area that had historically been the function of the jury (Tr. 3365).

The judge also found that this area was not actually a "science", but an evolving field of learning (Tr. 3340-3341). Recognizing his discretion, the judge ruled that the best use of Ofshe's testimony was for him to testify to general principles, and to allow the jury to apply the information if they credited it (Tr. 3341-3342). The defendant objected to this limitation (Tr. 3442).

The defendant cites to cases involving the defendant's right to cross-examination (*See* Commonwealth v Vardinski, 438 Mass. 444 [2003], and Commonwealth v Sansone, 252 Mass. 71 [1925]), not the presentation of evidence during direct examination.

As with Dr. Brown's proposed testimony, the proposed testimony of Ofshe would have allowed the defendant to present evidence before the jury in an inadmissible form. The impermissble scope of questioning that the defendant sought would have allowed him to repudiate evidence and comment upon the credibility of witnesses without the defendant having to take the stand and be subject to cross-examination.

Although the judge did not find explicit vouching (Tr. 3365), Ofshe's testimony would also have amounted to inadmissible vouching of the defendant's position on Ofshe's part. Where a witness explicitly links the opinion to the experience of the defendant, the opinion is clearly impermissible vouching. See Richardson, supra at 185 (child sexual assault victims).

Defense counsel also tried to bootstrap Dr. Brown's excluded testimony relating to the defendant's self-serving hearsay statements into Ofshe's testimony. Defense counsel attempted to elicit from Ofshe what information of Dr. Brown's that Ofshe reviewed to come to his own opinion in this case (Tr. 3460-3461).

It was within the judge's discretion to preclude testimony touching upon the alleged relationship between various interrogation techniques and false confessions. The defendant has not shown that the judge abused his discretion or committed an error of law.

C. Although not required, the defendant received a *Bowden*-type instruction. He was not entitled to an acquittal as a matter of law based upon the testimony of his own expert.

An instruction pursuant to Commonwealth v Bowden, (379 Mass. 472 [1980]) is discretionary. The giving of such an instruction is never required. Commonwealth v Williams,

439 Mass. 678, 687 (2003). There is no "*Bowden* instruction". Id. *Bowden* holds only that a judge may not remove the issue from the jury's consideration. Id. (further citations omitted).

The decision whether to give a jury instruction regarding inferences that may be drawn from the failure of the police to conduct forensic tests lies within the discretion of the trial judge. Commonwealth v Cordle, 412 Mass. 172, 177 (1992) (further citations omitted)("*Cordle II*"). In this case the judge did in fact give a *Bowden*-type instruction to the jury (Tr. 3604-3606).

If there were inferences favorable to the defendant to be drawn based on deficiencies in the police investigation, it was the job of the defense to urge them to the jury. Cordle, supra at 177 (footnote omitted), *quoting* Commonwealth v Porcher, 26 Mass. App. Ct. 517, 520-521 (1988). In this case the defendant presented an expert, Richard Saferstein, who criticized the handling of this investigation (Tr. 3079-3108). In his closing, defense counsel also argued that the deficiencies in the police investigation raised reasonable doubt as to the defendant's guilt (Tr. 3524-3527, 3529, 3532, 3534-3535, 3539-3542, 3543-3544, 3546-3548).

A defendant is never entitled to an acquittal as a matter of law based upon a claim that the police did not conduct a thorough or proper investigation. The testimony of the defendant's expert created issues of fact and credibility for the jury to resolve.

D. **The defendant has no standing to challenge the retrieval of a phone call between Juror Huffman and her partner Hicks, who was incarcerated at the time.**

The defendant has no standing to raise a challenge to the police's retrieval of a tape of Hick's phone conversations from jail with Juror Huffman. To the extent that the defendant raises an objection pursuant to the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, the defendant lacks standing. The defendant is not charged with a crime in which the possession of the tape is an essential element of guilt. *See* Commonwealth v Frazier, 410 Mass. 235, 242-243 (1991), *quoting* Commonwealth v Amendola, 406 Mass. 592, 601 (1990). The defendant in this case has not manifested a subjective expectation of privacy in the tape recording of Hicks' conversation with Juror Huffman, nor is society willing to recognize that such an expectation would be reasonable. Commonwealth v Montanez, 410 Mass. 290, 301 (1991) (further citations omitted). The

defendant has not met his burden of proving both of these elements. Montanez, supra at 301, *citing* Commonwealth v Mamacos, 409 Mass. 635, 638 (1991).

To the extent that the defendant raises an objection based upon privacy interests found in the Fifth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights, the defendant has no standing. *See* Commonwealth v Tiexeira, 29 Mass. App. Ct. 200, 207 (1990) (further citations omitted) (privilege against self-incrimination). The privilege and interests are personal to Hicks. See Commonwealth v Simpson, 370 Mass. 119, 121 (1976) (privilege against self-incrimination). The privilege is a personal one and Hicks is in a position to protect it by his own means. *See* Commonwealth v Smith, 386 Mass. 345, 349 (1982) (privilege against self-incrimination). This defendant cannot assert a privilege that is personal to Hicks. *See* Tiexeira, supra at 207.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court deny the relief requested and affirm the defendant's conviction.

Respectfully submitted,

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April 2, 2010